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October Term, 1969

No. 902

MARY GREEN and EDWIN GREEN, JR.,
as Administrator of the Estate of
EDWIN GREEN, Deceased,

Petitioners,

vs.

THE AMERICAN TOBACCO COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED.	4
CONSTITUTIONAL PROVISION INVOLVED	5
RULE INVOLVED.	5
STATEMENT OF THE CASE.	8
REASONS FOR GRANTING THE WRIT. .	19
I. THE DECISION BELOW IN THE DIVERSITY CASE AT BAR CONFLICTS WITH FLORIDA IMPLIED WARRANTY LAW AS SET FORTH BY THE FLORIDA SUPREME COURT	19
II. THE COURT OF APPEALS BELOW SHOULD HAVE CERTIFIED THE ENTIRE CASE AT BAR TO THE FLORIDA SUPREME COURT UNDER THE SPECIAL CIRCUMSTANCES INVOLVED. . . .	25
III. THE DECISION BELOW VIOLATES PLAINTIFFS' RIGHT TO A FULL AND FAIR JURY TRIAL UNDER THE SEVENTH AMENDMENT .	33

INDEX

	Page
CONCLUSION	39
CERTIFICATE OF SERVICE	40

TABLE OF AUTHORITIES

Page

CASES

BLANTON v. CUDAHY PACKING CO.,
Fla. 1944, 19 So.2d. 313 22

CARTER v. HECTOR SUPPLY CO.,
Fla. 1961, 128 So.2d. 390 . . . 23

CLIETT v. LAUDERDALE BILTMORE CORP.,
Fla. 1949, 39 So.2d. 476 23

FOLEY v. WEAVER DRUGS, INC.,
Fla. 1965, 177 So.2d. 221 . . . 23

GREEN v. AMERICAN TOBACCO COMPANY,
5th Cir. 1962, 304 F.2d. 70,
on reh. 304 F.2d. 85, on certification, Fla. 1963, 154 So. 2d. 169, on receipt of answers,
5th Cir. 1963, 325 F.2d. 673,
cert. den. 1964, 377 U.S. 943,
84 S.Ct. 1349, 12 L.ed.2d. 306,
on appeal after retrial, 391
F.2d. 97, on reh. en banc.,
___ F.2d. ___ (April 8,1969) . . 2 et seq

HOPKINS v. LOCKHEED AIRCRAFT CORP.,
5th Cir. 1966, 358 F.2d. 347 . . 27

KAISER STEEL CORP. v. W. S. RANCH CO.,
1968, 391 U.S. 593, 88 S.Ct.
1753, 20 L.ed.2d. 835 . . . . . 18, 30

TABLE OF AUTHORITIES

Page

MARTINEZ v. RODRIQUEZ,
5th Cir. 1968, 394 F.2d. 156;
following receipt of answers
on certification, 1969, 410
F.2d. 729 28

MIAMI COCA COLA BOTTLING CO. v. TODD,
Fla. 1958, 101 So.2d. 34 23

McLEOD v. W. S. MERRELL COMPANY,
DIVISION OF RICHARDSON-MERRELL, INC.,
Fla. 1965, 174 So.2d. 736 23

SENCER v. CARL'S MARKETS,
Fla. 1950, 45 So.2d. 671 23

ZWICKER v. KOOTA,
1967, 389 U.S. 241, 88 S.Ct.
391, 19 L.ed.2d. 444 29

CONSTITUTIONAL PROVISIONS

Constitution of the United States,
Seventh Amendment 33, 37

STATUTES

28 United States Code Sec.
1254 (1). 4

Fla. Stat. (1959) Sec. 25.031 . . . . 5, 26

TABLE OF AUTHORITIES

Page

RULES

Federal Rules of Civil Procedure, Rule 49(b) 10

Florida Appellate Rules, Rule 4.61 26

OTHER AUTHORITIES

Frumer & Friedman, Products Liability, Sec. 16.03(4)(a) . . . 35

"Smoking & Health, Report of the Advisory Committee to the Surgeon General of the Public Health Service" 36

ra

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PETITION FOR A WRIT OF CERTIORARI TO
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Petitioners pray that a writ of certio-

ri issue to review the judgment of the

United States Court of Appeals for the Fifth Circuit en banc entered in the above-entitled cause on April 8, 1969, petition for rehearing having been denied on July 7, 1969.

OPINIONS BELOW*

The initial opinion of the Court of Appeals following the first jury trial herein is reported at 304 F.2d. 70 and appears in Appendix A (App. p. 1a). The opinion of the Court of Appeals granting rehearing and certifying a question to the Florida Supreme Court is reported at 304 F.2d. 85 and appears in Appendix B (App. p. 33a). The Florida Supreme Court's advisory opinion is reported

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* As the opinions below are voluminous, a separate Appendix to Petition accompanies this Petition under this Court's Rule 23 (1)(i). "App." refers to said Appendix and "CT" refers to the Certified Transcript.

at 154 So.2d. 169 and appears in Appendix C (App. p. 36a). The opinion of the Court of Appeals granting appellants a partial new trial is reported at 325 F.2d. 673 and appears in Appendix D (App. p. 44a).

The initial opinion of the Court of Appeals following the second jury trial herein is reported at 391 F.2d. 97 and appears in Appendix G (App. p. 66a). The opinion of the Court of Appeals (rehearing en banc having been granted) is reported at ___ F.2d. ___ and appears in Appendix J (App. p. 110a).

JURISDICTION

The judgment of the Court of Appeals en banc was entered on April 8, 1969, and appears in Appendix L (App. p. 123a). Petition for rehearing was denied on July 7, 1969, (App. K, App. p. 121a) and by Order of Mr.

Justice Black, dated September 16, 1969, the time for filing the written Petition for Writ of Certiorari was extended to and including December 4, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

I.

DOES THE DECISION BELOW IN THE DIVERSITY CASE AT BAR CONFLICT WITH FLORIDA IMPLIED WARRANTY LAW AS SET FORTH BY THE FLORIDA SUPREME COURT?

II.

SHOULD THE COURT OF APPEALS BELOW HAVE CERTIFIED THE ENTIRE CASE AT BAR TO THE FLORIDA SUPREME COURT UNDER THE SPECIAL CIRCUMSTANCES INVOLVED?

III.

DOES THE DECISION BELOW VIOLATE PLAINTIFFS' RIGHT TO A FULL AND FAIR JURY TRIAL UNDER THE SEVENTH AMENDMENT?

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the Constitution of the United States states as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

RULE INVOLVED

The Florida certification rule involved is Rule 4.61 of the Florida Appellate Rules (pursuant to Sec. 25.031, Fla. Stat. [1959])

nd states as follows:

"Rule 4.61. CERTIFIED QUESTIONS FROM FEDERAL COURTS

a. When Certified. When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of law of this state to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

b. Jurisdiction. Questions or propositions of law referred to in sub-paragraph a hereof shall be certified for answer to the Supreme Court of this state.

c. Method of Invoking Rule. The provisions of this rule may be invoked by any of the federal courts referred to in sub-paragraph a hereof upon its own motion or upon the suggestion or

motion of any interested party when approved by such federal court.

d. Contents of Certificate. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

e. Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, it shall be certified to the Supreme Court by the clerk of the federal court and under its official seal. The Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said cause.

f. Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this Court.

g. Briefs and Argument. The

appellant or moving party in the federal court shall file and serve upon its adversary its brief on the questions certified within 30 days after the filing of said certificate in the appellate court of this state having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within 20 days after the receipt of appellant's or moving party's brief and a reply brief shall be filed within 10 days thereafter.

h. Oral Argument. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits."

STATEMENT OF THE CASE

Petitioners seek this Court's review of the decision of the Court of Appeals for the Fifth Circuit en banc overruling the majority of the Appellate Court's panel and

affirming judgments for defendant-American Tobacco Company. Since the decision below comes after two jury trials and two sets of appellate proceedings during the past twelve years, this "Statement" does not attempt to note everything that has occurred. The numerous majority and dissenting opinions appearing in the 124 page "Appendix to Petition" contain histories of the litigation involved (see e.g. Judge Coleman's majority opinion of January 24, 1968, 391 F.2d. 97, App. pp. 66a-73a).

In December, 1957, Edwin Green Sr. sued the American Tobacco Company for lung cancer caused by his smoking of defendant's Lucky Strike cigarettes,

alleging inter alia breach of implied warranty of fitness for human consumption. Jurisdiction of the United States District Court for the Southern District of Florida was based on diversity of citizenship. Mr. Green died on February 25, 1958; his Administrator was substituted as plaintiff and his widow brought suit under the Florida wrongful death statute (CT Vol. VII p. 15).

At trial No. 1 the jury found that Edwin Green Sr.'s fatal lung cancer was proximately caused by his smoking of defendant's cigarettes but that defendant could not reasonably have known of the danger at the time his lung cancer was discovered (answers to special interrogatories No. 1-4, CT Vol. VII pp. 37-38, see Rule 49(b), Fed. R. Civil

Proc.) and therefore brought in general verdicts for defendant (CT Vol. VII pp. 35-36).

On Appeal No. 1 the Court of Appeals (Judge Cameron dissenting) initially rejected plaintiffs' claim that they were entitled to judgment on liability as a matter of law since defendant's "knowledge" was irrelevant to liability for breach of implied warranty (304 F.2d. 70, App. p. 1a), and then, on rehearing, certified the knowledge question to the Florida Supreme Court (304 F.2d. 85, App. p. 33a). The Florida Supreme Court's advisory opinion held defendant's "knowledge" irrelevant and explicitly denied that "the wholesomeness of a product should be determined on any standard other than its actual safety for human consumption..." (154 So. 2d. 169, 173, App. pp. 36a, 42a-43a). The

Court of Appeals (Judge Cameron dissenting in part) then reversed the judgments for defendant and remanded for a new trial limited to the sole remaining liability issue of "whether or not the cigarettes were 'reasonably fit and wholesome'" and the issue of damages (325 F.2d. 673, 677, App. pp. 44a, 50a); the Court of Appeals held that defendant could not relitigate the proximate cause finding "already conclusively established" by the jury's answers to Special Interrogatories No. 1, 2 and 3 (325 F.2d. 673, 678, 679, App. pp. 44a, 52a, 53a , emphasis added).

This Court denied defendant's Petition for a Writ of Certiorari and plaintiffs' Cross Petition for a Writ of Certiorari (377 U.S. 943, 84 S. Ct. 1349, 1351, 12 L.ed.2d.

306, App. p. 64a).

At Trial No. 2 plaintiffs' expert evidence on the issue of "reasonable fitness" demonstrated that cigarettes cause about 10% of heavy smokers to die of lung cancer after about twenty years of smoking (see e.g. CT Vols. VII and VIII, pp. 157, 166, 173, 189, 192, 194, 203, 261, 263; 291, 341, 336, 314, 317; 217, 214; 463-464, 472-473, 478, 397; 567, 580, 571; 416-419, 436, 438-439, 446, 448). Defendant's evidence on "reasonable fitness" consisted of expert testimony to the effect that "nobody knows the cause of lung cancer" (see e.g. CT Vol. VIII pp. 649, 651-652, 654-665; 730, 732; 772; 785-786, 791-792, 808-811; 804, 819; 826-827, 831; 913-914; see also App. p. 78a). Following a surprise supplemental charge in effect

directing a verdict for defendant (CT Vol. VIII pp. 994-995), the jury returned such verdict (CT Vol. VIII p. 996).

On Appeal No. 2 plaintiffs challenged (1) the denial of their motions for directed verdict on the issue of liability, (2) the surprise supplemental charge, (3) the admission of defendant's expert testimony that no one knows lung cancer's cause, and (4) certain exclusionary rulings by the trial court.

The Court of Appeals (Judge Simpson dissenting) once again reversed the judgments for defendant (391 F.2d. 97, App. p. 66a). Judge Coleman's majority opinion held that defendant's improper expert testimony required a new trial because it involved relitigation of the issue of proximate

cause contrary to the jury's findings at Trial No. 1 and to the Court of Appeals' then controlling opinion (391 F.2d. 97, App. pp. 78a-83a); moreover, the remand was with directions to enter judgments for plaintiff on the issue of liability since intervening Florida cases rendered it clear that a "rule of absolute or strict liability applies with no 'reasonable' limitation on fitness and wholesomeness for human consumption" (391 F.2d. 97, App. pp. 83a-87a).

Defendant's petition for rehearing en banc was granted by the Court of Appeals (App. p. 107a) with the preference that "unless there is objection by the parties, the case be submitted on briefs without oral argument" (App. p. 108a). Plaintiffs'

"Motion of Appellant Requesting Oral Argument on Rehearing En Banc" (CT Vol. IX, Document 13) yielded no direct ruling but about two months later the Court of Appeals modified its prior order to provide rehearing en banc "on briefs and without oral argument" (App. p. 109a).

The Court of Appeals on rehearing en banc rendered a short per curiam opinion as follows (App. pp. 110a-111a):

> "PER CURIAM: The Court sitting en banc recedes from and overrules the decision of the majority of the panel in this case. Both Parts I and II of the opinion are overruled by the Court. We affirm the judgments of the lower court for the reasons and upon the principles set forth in Judge Simpson's dissent, 391 F.2d. at 106.
>
> AFFIRMED."

Judge Coleman's dissenting opinion, in

which Chief Judge Brown and Judge Godbold join, App. pp. 111a-116a, and Chief Judge Brown's dissenting opinion, in which Judges Coleman and Godbold join, App. pp. 116a-120a, take the dual position that (1) plaintiffs are entitled to judgments on liability as a matter of law and (2) certification to the Florida Supreme Court should be made under the circumstances involved. Judge Coleman's dissenting opinion states as follows (App. p. 112a):

> "[I disagree with the holding of the Court en banc] that he who sells for profit a product which caused the dread disease of cancer and also caused that ultimate of all dreads, death itself, can wiggle out of it by convincing a lay jury in a swearing match among super-scientists that such a product may somehow be reasonably safe for personal consumption by the general public."

Chief Judge Brown's dissenting opinion states as follows (App. pp. 116a, 119a):

> "...charged as we are with the duty to accept, try and pass on diversity cases---we are engaging in the wildest of guesses as to what the law of Florida is, or what the Supreme Court of Florida would say it is.
>
> * * *
>
> "With this court so divided, the minimum that should be done is to certify this now critical question to the Florida Supreme Court, just as was done in effect by the Supreme Court's summary reversal of Kaiser Steel.../ 1968, 391 U.S. 593, 88 S.Ct. 1753, 20 L. ed.2d. 835 /. Florida has the right to determine for its ever increasing millions and for the millions of much coveted perennial visitors whether a product that dooms one in ten to the terrible disease can ever be fit or wholesome, reasonably or otherwise."

Plaintiffs' "Amended Petition for Rehearing and Brief in Support" (CT Vol. IX Document 27) was denied by the Court of

Appeals en banc on July 7, 1969 (App. p. 123a).

REASONS FOR GRANTING THE WRIT*

1. The decision and per curiam opinion below, adopting Judge Simpson's dissent (391 F.2d. at 106, App. p. 87a) verbatim and without elaboration, conflict with Florida implied warranty law as set forth by the Florida Supreme Court in its advisory opinion in the case at bar (154 So. 2d. 169, App. p. 36a) and other opinions of said state court.

First, the opinion below holds that "the Supreme Court of Florida recognized... ['reasonably wholesome or fit'] as the

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* "Reasons" No. 1, 2 and 3 correspond to "Questions Presented" No. 1, 2 and 3 supra.

scope of the implied warranty" in the case at bar (301 F.2d. at 113, App. p. 105a), but the Florida Supreme Court's advisory opinion after Trial No. 1 explicitly stated that the sole question certified to it by the Court of Appeals did "not request a statement of the scope of warranty implied in the circumstances of this case" (154 So.2d. at 170, App. pp. 37a-38a).

Second, the opinion below interprets Florida implied warranty law as precluding a manufacturer's liability where "there was not some defect or adulteration in the product" (391 F.2d. at 111, App. p. 100a), but the Florida Supreme Court's advisory opinion is to the contrary and cites with approval a Wisconsin decision holding that breach of warranty might be found "...

'where injury was caused by a chicken bone in a chicken sandwich...'" (154 So.2d. at 172, fn.11, App. pp. 41a-42a). Also, the opinion below apparently overlooks the evidence of arsenic presented by plaintiffs in the case at bar (CT Vol. I pp. 212-221 and Vol. VII pp. 531, 533-537).

Third, the opinion below relies on the Florida Supreme Court's "approval... [of the remand in the case at bar on Appeal No. 17 for 'trial on issues of fact'" (391 F.2d. at 110, App. p. 98a), but the Florida Supreme Court's advisory opinion specifically stated that the certified question did "not present for our consideration the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of

law unmerchantable in Florida..." (154 So. 2d. at 170, App. pp. 37a-38a). Obviously the Florida Supreme Court deemed itself limited to answering the "knowledge question" certified to it by the Court of Appeals on Appeal No. 1 and therefore could not and did not determine whether plaintiffs were entitled to judgment on liability or what factual issues (if any other than damages) remained to be litigated at Trial No. 2.

Fourth, decisions and opinions of the Florida Supreme Court prior to the case at bar establish that Florida imposes absolute and strict liability for breach of implied warranty of fitness for human consumption, see e.g. Blanton v. Cudahy Packing Co., Fla. 1944, 19 So.2d. 313, 314,

Cliett v. Lauderdale Biltmore Corp., Fla. 1949, 39 So.2d. 476, Sencer v. Carl's Markets, Fla. 1950, 45 So.2d. 671, 673, Miami Coca Cola Bottling Co. v. Todd, Fla. 1958, 101 So.2d. 34, 35, cf. Carter v. Hector Supply Co., Fla. 1961, 128 So.2d. 390, 392.

Fifth, two cases discussed in Judge Coleman's initial majority opinion on Appeal No. 2 (391 F.2d. 97, App. pp. 73a, 84a, 88a) are McLeod v. W. S. Merrell Company, Division of Richardson-Merrell, Inc., 1965, 174 So.2d. 736, 739, in which the Florida Supreme Court summarized the Green case at bar as one "which applied a rule of absolute or strict liability..." and Foley v. Weaver Drugs, Inc., 1965, 177 So.2d. 221, 229, in which the Florida

Supreme Court once again referred to "the absolute liability imposed upon the manufacturer.../for breach/ of an implied warranty of fitness and wholesomeness..." As stated by Judge Coleman (App. p. 86a), neither case "anywhere modified or limited the requirement of fitness or wholesomeness to 'reasonable fitness' or 'reasonable wholesomeness'" with respect to products for human consumption or use.

Judge Coleman's dissenting opinion below (App. pp. 111a-116a) cogently demonstrates why Florida implied warranty law could not permit the result reached by the majority below:

> "The one inescapable consideration is that a jury found as a fact that Mr. Edwin Green, Sr. died of primary cancer of the lung, caused from smoking Lucky Strike cigarettes.

> This finding was affirmed by this Court [5th Cir.], 304 F.2d. 70 (1962); 325 F.2d. 673 (1963). The decisive point is that when a jury so found there simply remained no further strict liability factual issue in the case...
>
> (App. p. 111a)
>
> "As to cancer-causing cigarettes, one must ask, how can anything, as a matter of fact, be reasonably fit for use by the general public when it is known to kill and no one knows whom it will kill?"
>
> (App. p. 113a).

2. Petitioners contend that the Court below should have certified the entire case at bar to the Florida Supreme Court under the special circumstances involved. The five majority opinions of the Court of Appeals in this case to date have been accompanied by five dissenting opinions to date. Although it seems clear to petitioners, to Chief Judge Brown and to Judges

Coleman and Godbold of the court below that plaintiffs are now entitled to judgments on liability as a matter of Florida implied warranty law, the majority of the court below en banc disagrees (App. pp. 110a-120a).

Florida's certification procedure specifically applies to cases in "Courts of Appeal of the United States" involving determinative state law questions when "there are no clear controlling precedents in the decisions of the [Florida] Supreme Court ..." (Florida Appellate Rules, Rule 4.61, "Rule Involved", supra; see also Fla. Stat. [1959], Sec. 25.031). As stated in Chief Judge Brown's dissenting opinion (App. p. 116a), the court below should not continue its "failure to use properly and exploit fully the remarkable tool of certification

to the Supreme Court of Florida."

On prior certification during Appeal No. 1 the Florida Supreme Court considered itself restricted to the four corners of the "knowledge question" certified to it by the Court of Appeals (154 So.2d. at 170, App. pp. 37a-38a). In subsequent cases the Court of Appeals rendered it clear to the Florida Supreme Court that particular certified questions "do not...foreclose the Supreme Court of Florida from deciding upon consideration of the allegations and facts in the record" (Hopkins v. Lockheed Aircraft Corp., 5th Cir. 1966, 358 F.2d. 347, 349) and that in order to avoid "the failure of the [certification] procedure" in the Green case at bar, the Florida Supreme Court's "widest possible latitude

in reaching decision.... extends to re-statement of the issue or issues and the manner in which the answers are to be given" upon the state court's analysis of the record involved (Martinez v. Rodriguez, 5th Cir. 1968, 394 F.2d. 156, fn. 2 at 157, fn. 6 at 159, after certification, 1969, 410 F.2d. 729). Thus, however the certified question be phrased were full certification to take place now, the Florida Supreme Court could determine (1) whether or not the cigarettes which caused Green Sr.'s fatal lung cancer were unmerchantable as a matter of law, and (2) whether or not plaintiffs are entitled to judgments on liability under Florida implied warranty law upon the trial records herein.

The decision of the court below manages to "write 'FINIS' to this long and

troublesome litigation" (391 F.2d. at 113, App. p. 106a) without ever giving the Florida Supreme Court (many of whose present members joined said court after prior certification herein) an opportunity for full review upon full certification. Such decision places an unnecessarily heavy burden on the "delicate balance in the area of federal-state relationships" (Zwicker v. Koota, 1967, 389 U.S. 241, 88 S.Ct. 391, 19 L.ed.2d. 444, concurring opinion of Mr. Justice Harlan, 389 U.S. at 399).

Since "Federal courts do not make the law with reference to state questions but merely ascertain and apply it" in diversity cases such as the one at bar (391 F.2d. 97, App. p. 115a) and since the implied warranty issue concerning cancer-

causing-cigarettes "which is crucial in this case is one of vital concern" to Florida and "is a truly novel one" (Kaiser Steel Corp. v. W. S. Ranch Co., 1968, 391 U.S. 593, 594, 88 S.Ct. 1753, 20 L.ed.2d. 835), certification is called for.

The case at bar seems to present more than sufficient "special circumstances" requiring invocation of the abstention doctrine (Kaiser Steel Corp. case, supra, U.S. at 595, S.Ct. at 1755, concurring opinion of Mr. Justice Brennan in which Mr. Justices Douglas and Marshall join). Chief Judge Brown's dissenting opinion below sets forth the special circumstances as well as the applicable law concerning abstention and certification (App. pp. 116a-120a); his conclusion

follows:

> "We know one thing for sure: no one knows just what the Supreme Court of Florida would say about the wholesomeness of a product that in one out of ten users brings about the dreaded cancer. Of course, Florida has a great stake in fashioning the products liability standards as a sanction to a strong judicial policy of protecting Floridians from the consequences of products of such portent.
>
> (App. pp. 118a-119a)
>
> "...the question is so vital to Florida that the state should be given the opportunity to fashion its own policy standard through the available, workable mechanism of certification."
>
> (App. p. 120a)

According to Judge Rives' majority opinion for the court below in the case at bar following prior certification during Appeal No. 1, the Florida Supreme Court's answer to the certified question at that time "saved this Court, through the writer

as its organ, from committing a serious error as to the law of Florida which might have resulted in a grave miscarriage of justice" (325 F.2d. 673, App. pp. 44a-45a).

Petitioners unsuccessfully requested the court below to certify the entire case to the Florida Supreme Court following its latest en banc decision of affirmance overruling its panel below (see "Motion of Appellant for Certification to the Supreme Court of Florida" and "Amended Petition for Rehearing and Brief in Support", CT Vol. IX Documents 18, 19 and 27). At this posture of the case at bar, only this Court can prevent the probably "grave miscarriage of justice" which will occur if the Florida Supreme Court cannot once and for all determine applicable state implied warranty

law herein.

3. Petitioners take the position that the decision and opinion below violate their right to a full and fair jury trial as guaranteed by the Seventh Amendment to the Constitution of the United States for several reasons.

First, defendant's expert evidence at Trial No. 2 on the issue of reasonable fitness, expert evidence to the effect that "nobody knows the cause of lung cancer", was not only contrary to the jury's finding of fact in answer to special interrogatories at Trial No. 1 that defendant's cigarettes proximately caused Green Sr.'s fatal lung cancer, but also violated the Court of Appeals' holding that such finding of fact was binding on all parties at

Trial No. 2 and could not be relitigated (325 F.2d. at 678, and 679, App. pp. 52a, 53a, 55a). As discussed in Judge Coleman's initial majority opinion on Appeal No. 2 (391 F.2d. 97, App. pp. 78a-83a), when the jury at Trial No. 2 was informed of the "binding finding" of the prior jury that defendant's cigarettes caused Green Sr.'s fatal lung cancer and was then presented with defendant's nobody-knows-cancer's-cause expert testimony, the jury was "required to return verdicts on choices between mutually impossible propositions" (App. p. 82a).

Second, the trial court's surprise supplemental charge to the jury in effect directed verdicts for defendant by requiring cigarettes to endanger an "important",

"responsible" and "large" portion of smokers and the general public (CT Vol. VIII pp. 994-995). It is self-evident that reasonable men might well consider ten percent not an important, responsible, large portion of smokers (leastwise the proportionately smaller percent of the general public involved), but the Court of Appeals' then-controlling decision specifically held that plaintiffs' "10% evidence" (if not a smaller percent) presented a jury question, permitted a jury verdict for plaintiffs, and prohibited a directed verdict for defendant (325 F.2d. at 676-677, App. pp. 49a-50a). Moreover, as stated in Frumer and Friedman's Products Liability in Sec. 16.03(4)(a), fn. 14.5h at pp. 3-64 and 3-65, the "test of numbers

in the allergy cases" should not have been applied in the case at bar since there was no indication "that persons who develop lung cancer from smoking are abnormal."

Third, the trial court made several broad evidentiary rulings excluding evidence of animal expermentation (see e.g. CT Vols. VII and VIII, pp. 229, 234, 241, 248, 306, 312, 469, 547-548, 910), testimony referring to the famous "Smoking and Health, Report of the Advisory Committee to the Surgeon General of the Public Health Service" and other recognized scientific authorities (see e.g. CT Vols. VII and VIII, pp. 70, 454-463, 67-74, 763, 885-886), and testimony not dealing with scientific fact or opinion exclusively within and based on the expert's own personal knowledge

and experience (see e.g. CT Vols. VII and VIII, pp. 73, 157, 160-167, 169-170, 174-175, 177-178, 189-195, 201-202, 214-218, 224-226, 266-267, 408-410, 429, 456, 460-463, 471, 475-476, 552-553, 555-557, 563, 566, 572-574, 590-591, 670-671, 722-723, 775-776, 799, 800-802, 804-807, 808-809, 832, 870, 885-886, 899, 929). The trial court's exclusionary rulings made it extremely difficult for plaintiffs to present anything other than statistical proof concerning the number of cigarette smokers contracting lung cancer and the risk involved.

Fourth, the decision below relies in part on the fact that "defendant...has twice won this case before a jury" (391 F.2d. 97, 107, App. p. 90a). Such reliance violates the Seventh Amendment's guarantee

of a full and fair jury trial free from reversible error since both the Court of Appeals and the Florida Supreme Court deemed Trial No. 1 tainted by harmful error (325 F.2d. 673, App. p. 44a; 154 So. 2d. 169, App. p. 36a). It should also be noted that several Judges of the Court of Appeals below deem Trial No. 2 equally tainted by reversible error (391 F.2d. 97, App. p. 66a; App. pp. 111a, 116a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted and the decision below reversed.

Respectfully submitted,

By_____

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and
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CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, a member of the Bar of the Supreme Court of the United States, hereby certify that a true copy of the foregoing Petition for Writ of Certiorari and separate Appendix to Petition were served on Respondent by mailing a copy thereof in a duly addressed envelope to A. LEE BARDFORD, ESQ., Dixon, Bradford, Williams, McKay & Kimbrell, 101 E. Flagler St., Miami, Florida 33131, and to E. R. NEAHER, ESQ., Chadbourne, Park, Whiteside & Wolff, 25 Broadway, New York, N. Y. 10004, Counsel for Respondent, this 2nd day of December, 1969.

Irma Robbins Feder